IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-793

JOHN D. EHRLICHMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner seeks a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit from an Opinion and Order of that Court affirming the conviction of JOHN D. EHRLICHMAN.

OPINION AND ORDERS BELOW

The opinion and order of the United States Court of Appeals for the District of Columbia Circuit of 12 October, 1976 is not officially reported and is attached to the Petition. The judgment of that Court, entered the same day, is attached as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 12, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented for review by way of the Petition for Writ of Certiorari are:

1. Did the United States Court of Appeals for the District of Columbia Circuit err in refusing to formulate and apply supervisory standards with regard to the necessity for continuing, changing venue or conducting voir dire in a case which was the subject of massive prejudicial pre-trial publicity, in violation of petitioner's constitutional right to a fair trial?

2. Did the United States Court of Appeals for the District of Columbia Circuit err by approving the deprivation of Petitioner Ehrlichman's right to have the benefit of the material testimony of Richard M. Nixon, former President of the United States, either at trial or by way of deposition, where that witness was temporarily ill, and where such testimony, if presented, might have led the jury to a different conclusion than that to which they arrived?

3. Did the United States Court of Appeals for the District of Columbia Circuit err when it approved Petitioner's deprivation of full and complete discovery pursuant to F.R. Cr.P. 16, the Jencks Act, and *Brady v. Maryland*, with the benefit of counsel to assist in the review of his White House papers?

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved are the Fifth and Sixth Amendments, United States Constitution, Amendment V and Amendment VI.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. V., p. 4.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const., Amend. VI., p. 4.

STATUTES INVOLVED

The statutes involved are 18 U.S.C.A. § 371, 18 U.S.C.A. § 3500 and 18 U.S.C.A. § 3503.

"Conspiracy to commit offense or to defraud the United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

18 U.S.C. § 371

"Demands for production of statements and reports of witnesses.

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * *

18 U.S.C. § 3500

"Depositions to preserve testimony.

"(a) Whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved, the court at any time after the filing of an indictment or information may upon motion of such party and notice to the parties order that the testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place. . .

* * *

"(f) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: . . . or that the witness is unable to attend or testify because of sickness or infirmity; . . .

* * *

18 U.S.C. § 3500

RULES INVOLVED

The rules involved are the Federal Rules of Criminal Procedure, Rule 14, Rule 15, Rule 16, and Rule 17.

"Relief from Prejudicial Joinder

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such

joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to produce in evidence at trial." F.R.Cr.P. 14.

"Depositions.

"(a) WHEN TAKEN. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. . .

* * *

F.R.Cr.P. 15

"Discovery and Inspection

(a) **Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.** Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, cus-

tody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) **Other Books, Papers, Documents, Tangible Objects or Places.** Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a)(2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

* * *

F.R.Cr.P. 16. Prior to 1975 amendment.

"Subpoena

* * *

"(c) FOR PRODUCTION OF DOCUMENTARY EVIDENCE AND OF OBJECTS. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. . .

* * *

F.R.Cr.P. 17

STATEMENT OF THE CASE

On March 1, 1974, the Grand Jury for the United States District Court, District of Columbia, returned a thirteen (13) count indictment charging Petitioner Ehrlichman together with John N. Mitchell, H. R. Haldeman, Robert Mardian, Kenneth Parkinson, Charles W. Colson and Gordon Strachan with various offenses in violation of the Laws of the United States.[1] All were charged in Count I with conspiracy (18 U.S.C.A. § 371). All but Mardian were charged in Count II with obstruction of justice (18 U.S.C.A. § 1503). Count III charged John N. Mitchell with making false statements to the FBI in violation of 18 U.S.C.A. § 1001, and Count X charged Peititioner with a similar offense. These two charges were dismissed at the end of the Government's case. Prior to trial, Charles W. Colson entered a negotiated plea to a separate offense and the indictment was dismissed as

[1] The trial commenced on October 1, 1974.

to him. Gordon Strachan, who was also charged individually in Count XIII, was severed. Consequently, those counts and Count XIII pertaining to Gordon Strachan were deleted from the indictment as it went to the jury as were the names of Strachan and Colson from caption and Counts I and II.

The jury returned its verdict on January 1, 1975. Kenneth Parkinson was acquitted and Petitioner John D. Ehrlichman, and his co-defendants were each found guilty on all remaining charges against them.

Thereafter, on February 27, 1975, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the District of Columbia Circuit. On October 12, 1976, the United States Court of Appeals for the District of Columbia Circuit entered its Opinion and Order affirming the conviction below.

STATEMENT OF FACTS

The facts in this most celebrated case stemming from the activities at the top of the Executive Branch of the United States Government are well known to everyone. The Court of Appeals set forth the facts underlying the charges in its opinion, at Sl. op. 6-22. For purposes of this petition we adopt the statement of facts as there outlined. Facts not related there are stated here in support of the questions presented.

The break-in of the Democratic National Committee in the Watergate Office Building occurred on June 18, 1972. From that day until May 1, 1974, when the first motion to ameliorate the prejudice of pre-trial publicity was filed, "[i]t can be conservatively estimated" that over 50,000 column inches of news stories about Watergate and the

principles were primed in the two local Washington newspapers alone. *United States v. Haldeman*, ___ F.2d ___ (D.C. Cir., 1976) Sl. op. (dissenting opinion) p. 3. This does not include daily television reports, nor does it include the televised hearing of the Senate Select Committee which preempted much of the day-time and night-time television programming in 1973. Indeed, the proceedings of the "Ervin Committee" amounted to a preliminary trial of the case. The Committee maintained its hearings even after then Watergate Special Prosecutor Archibald Cox asked to desist in deference to the defendants' right to a fair trial.

Moreover, in the summer of 1974 (the few months preceding the trial which commenced on October 1, 1974) "Watergate" became a national obsession culminating in the resignation of the Presidency by Richard M. Nixon on August 8, 1974. Prior to that time televised debates of the Judiciary Committee of the House of Representatives called for the impeachment of Mr. Nixon. In so doing, opinions that the President and his former aides were guilty permeated the airwaves and the newspapers.

Finally, on September 8, 1974, President Ford pardoned Mr. Nixon. One of his reasons for doing so emanated from the unprecedented publicity attendant to the case and that "it is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed." Statement of President Ford, *Washington Post*, September 9, 1974, p. A1. Less than one month later, the trial began on October 1.

Ehrlichman subpoenaed Mr. Nixon on *September 4, 1974* to testify at the trial. The subpoena was issued prior to any indication Mr. Nixon's incapacitating illness in a good faith belief that the former President would be a key witness in establishing that Ehrlichman was not part of any conspiracy to obstruct justice; on the contrary, that Mr. Nixon had taken the position that a full disclosure and cooperation with the proper authorities was the logical way to proceed. The trial judge had determined that Mr. Nixon's testimony was relevant and material by his ruling concerning the materiality and relevancy of the Nixon tapes.

It became public knowledge that Mr. Nixon was under a doctor's care by September 11 and in the hospital by September 23. R. 496. On September 18, Ehrlichman filed a motion for a continuance and severance setting out areas in which he wished to interrogate and asking for a mere 60-90 day continuance. On the same date, September 18, the government subpoenaed the former president. On September 19, the government in opposition to the above motion filed a response stating that there was no indication that Mr. Nixon would be unable to appear as a witness during the trial of this case. They further stated that the government proposes to call Mr. Nixon during its case and had issued a subpoena for this purpose; "thus the government has just as much interest in securing Mr. Nixon's testimony at trial as does Defendant Ehrlichman." R. 423. On September 20, the trial judge denied Ehrlichman's motions without stating his reasons therefor.

On September 27, Ehrlichman filed a motion for continuance and severance setting forth numerous areas wherein Mr. Nixon had exclusive knowledge of a great number of exculpatory facts which are the subject matter for this action. R. 469.

The trial judge denied this motion on October 1. Mr. Nixon filed a motion on October 3 to quash the subpoena alleging that his physical condition was such that compliance with the subpoena would have been detrimental to

his health and would have posed a serious threat to his life. JA 495.

At such hearing the trial judge stated that it would be helpful not only to the jury and all of the defendants if Mr. Nixon made an appearance to be examined in open court and further stated that "Mr. Ehrlichman has many questions I suppose he wants to ask him." R. 400/2964, 2968.

On October 17 Nixon's counsel said the former president's progress was good and that he could appear in three or four weeks. However, by November 12, he reported that the former president would be unable to attend and testify. He appointed a medical panel on November 13 to examine and thereafter advise him concerning Mr. Nixon's condition, the court having found that the interests of the Defendant Ehrlichman and proper administration of justice required the appointment of a panel, R. 671. The panel reported back on November 29, stating that a deposition could not be taken prior to January 6, and that his testimony in person could not be adduced prior to February 1975.

Ehrlichman moved for leave to depose Richard Nixon and filed a memorandum in support thereof setting out in detail material and relevant issues on which Mr. Nixon, an unindicted co-conspirator, would testify. R. 704-707. The trial judge denied such motion and required Ehrlichman to proceed with the trial without the testimony of the chief actor in the entire proceedings. Ehrlichman had diligently and repeatedly attempted to obtain the testimony in person or by deposition of Mr. Nixon before the trial and throughout the proceedings. The trial court's rulings precluded Defendant Ehrlichman from presenting evidence in

his favor which would have been relevant and material to his defense.

REASONS FOR ALLOWING THE WRIT

1. Petitioner was deprived of his constitutional right to a fair and impartial trial when the trial was not continued, venue changed or adequate voir dire conducted in light of the unprecedented pretrial publicity, in the absence of clear standards.

The question of prejudical pretrial publicity is a significant question of national importance to the administration of justice since it arises as a result of the accelerated and immediate media coverage in many cases of public interest. An avalanche of nationwide pretrial publicity preceded the trial of this case. Furthermore, the Washington, D.C. area received the greatest and most intense coverage of the matter. Yet, the trial court with approval from the Court of Appeals perceived voir dire as the only required safeguard. That this reliance was misplaced is demonstrated *infra*. The Court of Appeals decision in this case leaves the circuits without judicial authority setting standards applicable in federal courts to handle problems attendant to massive pretrial publicity, pre-voir dire. There is a need for a clear standard to which the district courts must adhere in determining their obligation. Forcing Petitioner to trial in Washington, D.C. under the prevailing circumstances violated his rights under any standard, constitutional or supervisory.

The prejudicial publicity surrounding this case on the eve of trial was overwhelming. When the jury selection process commenced, the veniremen had been subjected to a deluge of adverse pretrial publicity. The publicity detailed factual allegations made against Ehrlichman. The veniremen had

witnessed what amounted to a preliminary trial of the issues of this case, as well as charges of other criminal misconduct, during televised hearings before the Senate Select Committee on Presidential Campaign Activities and during the "Plumbers' Trial." *United States v. Ehrlichman,* Criminal Case No. 74-116 (D.D.C. 1974) aff'd May 12, 1976, Appeal No. 74-1882, petition for cert. pending, No. 76-383.

For petitioner, the impact of the prejudicial pretrial publicity was particularly devastating. The end of the "Plumbers' Trial" provided no relief. On the contrary, the events which followed the court's denial–in the instant case–of Ehrlichman's Motion for Dismissal, Continuance and/or Change of Venue intensified the effect of the prior pretrial publicity. The issuance of a subpoena upon Mr. Nixon, then President of the United States, by the Watergate Special Prosecutor, culminated in the celebrated decision by this Court in *United States v. Nixon,* 418 U.S. 683, 41 L.Ed.2d 1039, 94 S.Ct. 3090 (1974). Immediately following that decision, the Committee on the Judiciary of the House of Representatives, Ninety-Third Congress, Second Session, considering the impeachment of Mr. Nixon, began to debate on the very facts which were the subject of the instant case. Throughout the televised debate, a number of congressmen stated specifically that they considered Ehrlichman and his co-defendants guilty of the crimes charged and, by inference, that the President was guilty. Indeed, Leon Jaworski, Watergate Special Prosecutor has stated recently:

> ". . . I knew in my own mind that if an indictment were returned and the court asked me if I believed Nixon could receive a prompt, fair trial as guaranteed by the Constitution, I would have to answer, as officer of the court, in the negative [The same reasoning would apply to Ehrlichman].

> "If the question were asked as to how long it would be before Nixon could be afforded his constitutional rights, I would have to say in fairness that I did not know." Jaworski, *The Right and The Power,* 237-238.

So great was the general response to this publicity, that the citizens of the District began on August 6, 1974, maintaining a vigil–three to four persons deep–outside the White House. The *Washington Post* reported the event as a "death watch." The House Judiciary Committee ultimately recommended Articles of Impeachment, but on August 8, 1974, in an event of singular historic importance in this Nation's two hundred year history–Mr. Nixon resigned from the Office of President. The apex of prejudicial pretrial publicity had been reached and continued until the trial commenced. With the resignation of Nixon, the weight of his guilt fell squarely upon the shoulders of his closest aides, the defendants in the instant case.

On the heels of resignation on Sunday, September 8, 1974, President Gerald R. Ford granted Mr. Nixon a full, unconditional pardon. Even in connection with the public statements surrounding that pardon, President Ford noted that "[i]t is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed." In this manner, the President of the United States also acknowledged something which the trial court below and the Court of Appeals refused to acknowledge, i.e., that neither Mr. Nixon nor his closest aides, with whom he allegedly conspired to commit offenses against the United States, could obtain a fair and impartial jury trial in the District of Columbia. The effect of the President's pardon of Mr. Nixon stirred a further wave of prejudicial pretrial publicity. Uniformly, members of Con-

gress and members of the Executive Branch declared their opinions to the effect that Ehrlichman and his co-defendants were guilty of the crimes charged. Thus, by the day the trial commenced, the jurors had been barraged with prejudicial pretrial publicity, all of which indicated to them that there had been an effective adjudication of guilt by those in positions within the government to know the true facts of this case.

The district judge faced, as do district judges throughout the federal system, the problem of dealing with the effect of pretrial publicity on the conduct of a fair criminal trial. Every celebrated case is, in a sense, unique; but a thread of commonality runs along all. Only the remove of time and place can hope to guarantee fairness. An *en masse* voir dire cannot suffice in the truly celebrated case. Yet, standards for dealing with these cases do not exist. Indeed, the Court of Appeals in its opinion below deliberately declined to perform its duty to set forth supervisory standards to govern cases subject to great amounts of pretrial public discussion.[2] See *Murphy v. Florida*, 421 U.S. 794, 804 (1975) (concurring opinion by Burger, C.J.); *Delaney v. United States*, 199 F.2d 107, 113 (1st Cir. 1952) (Setting forth supervisory standard of continuance in celebrated cases).

In refusing to formulate a supervisory standard at the pre-voir dire stage, the Court of Appeals stated the matter of continuance "must depend solely on the subjective reaction of the judge . . . Invocation of an appellate court's supervisory power to require a continuance or change of venue . . . would therefore introduce additional unguided discretionary line drawing and consequent uncertainty into the

[2] The Court of Appeals made a studied refusal to "attempt to formulate a supervisory power standard for concluding that a fair jury cannot be selected". Sl. op. at 28.

process . . . [and] would not guarantee a commensurate increase in the fairness of federal criminal trials. Sl. op. 28-30. This rationale poses the question whether the foregoing is a sufficient reason for the Court of Appeals' failure to formulate a supervisory standard. Similarly, should a federal court be allowed to discriminate against a particular defendant simply because it is difficult to draw the lines or because he was charged with a white collar crime rather than a crime of passion.[3] It is an unacceptable irony that this petitioner should be discriminated against precisely because he was the subject of pervasive pre-trial publicity.

The Court of Appeals having failed to fill the vacuum, examined this case in light of prior cases of this Court treating problems posed by state courts under the Constitutional standard. The Court neutralized and then distinguished the facts here from those involved in such constitutional cases as *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Shepard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Turner v. Louisiana*, 379 U.S. 466 (1965).

Indeed, there is a conflict at least between the First and D.C. Circuits as to the necessity of formulating and then applying supervisory standards for use in the federal courts. *Delaney v. United States, supra.* This court should resolve that conflict.

[3] The Court of Appeals agreed with the government that a technical white collar prosecution is of small interest to lay people when compared with violent crimes such as murder and rape. Sl. op. 28-29 fn. 37. The court concludes, in effect, that the white collar defendant is not entitled to any formulation or application of pre-voir dire supervisory standards.

Given the theory of the Court of Appeals that the only remedy available was voir dire, it was the duty of the trial court and the Court of Appeals to evaluate the voir dire to determine whether an impartial jury could be selected. However, as noted by Judge MacKinnon's opinion in the court below, the purpose of voir dire was to enable the court and counsel to engage in a rational analysis of the venireman's attitudes regarding the case. The conclusory and ultimate questions asked by the trial judge in the nature of "are you unfairly biased in this case?" were useless in such an inquiry. *Delaney v. United States, supra.*

In the voir dire, the trial court restricted its inquiry to what the venireman remembered from the pre-trial publicity. Such a voir dire did not negate the possibility that while prospective jurors did not recall particulars they did form and retain some strong general opinions about what they had seen and heard. Further, Judge MacKinnon found that the voir dire in the case was unacceptable and concluded that a continuance or change of venue should have been granted. Judge MacKinnon's opinion is amply supported by the record below.

The trial court accepted any prospective juror who professed no opinion of guilt. The court refused to probe further to ascertain if any juror's belief in his own neutrality was in any way unduly eroded by deep-seated feelings of hostility or prejudice. As a result, the court failed to exercise that diligence necessary to correct the abuses of the prejudicial pre-trial publicity. The voir dire was inappropriate and inadequate to ferret out those jurors who were not qualified to serve in this case.

So ineffective was the voir dire examination as conducted by the trial judge that juror, Marjorie Milborn

(No. 6), after being selected and the trial commenced, wrote a note to the trial judge raising the issue of her ability to impartially serve as a juror. She stated that she had previously written letters to the Ervin Committee and various newspapers decrying the moral tone of Watergate. A motion was made by Ehrlichman to interrogate her concerning the content of the letters; this request was refused. Ehrlichman moved to discharge the entire jury. (Supp. T. 21). Such motion was denied. Marjorie Milborn was one of the jurors who rendered the guilty verdict. The only rationale for such ruling was the trial judge's obsession to do nothing that would result in a mistrial and that the case would go forward regardless of the circumstances. Even the government has conceded in its brief below that Marjorie Milborn was arguably predisposed towards guilt. A person with such preconceived notions as to the facts and implications of the whole Watergate affair should have been revealed by a voir dire examination designed to meet the constitutional mandate for the selection of a fair and unbiased juror.

Petitioner submits that this case presents as significant an issue for decision by this Court as exists in the orderly processes of the federal courts. Standards must be promulgated to assure that, in the face of massive prejudicial pre-trial publicity, the lower courts will meaningfully assess the time, place and mode of a particular trial. It may be that continuance is the only meaningful remedy. In many instances, as here, the pervasiveness of the publicity along with the subliminal effect it has, may preclude voir dire as a meaningful approach. The problem admits of standards from the court for use at the pretrial stage, and, petitioner submits, cries out for them. All criminal defendants, no matter what their crimes, are

entitled to a fair trial, by an impartial jury. When massive pretrial publicity threatens that right, remedial measures taken pursuant to their supervisory standards must be available and mandated. The studied refusal by the Court of Appeals to formulate such standards underscores the necessity for this Court to test the fairness of this particular trial.

REASONS FOR ALLOWING THE WRIT

2. Petitioner Ehrlichman was deprived of the material and relevant testimony of Richard Nixon either by deposition or in person.

To permit the decision of the United States Court of Appeals for the District of Columbia Circuit of October 12, 1976 (Sl. op. 69-84) and the decision of the trial court of September 20, 1974 (Jt. App. 425) to stand for the reasons stated therein nullifies the Sixth Amendment right to compulsory process. Prior to the inception of the trial on October 1, 1974 and throughout the proceedings, Petitioner made every conceivable effort to obtain the testimony either in person or by deposition of the former president. Throughout the Watergate affair, Richard Nixon was the main actor. To expect Ehrlichman to conduct his defense without the testimony of Richard Nixon is tantamount to asking a Shakespearean troupe to perform "Hamlet" without Hamlet. As reflected by this record, Richard Nixon – although physically absent from the courtroom – was at the heart of each of the government's main contentions. Never before has a single witness been so central a figure as was Richard M. Nixon in this case. Motions for continuance and/or severance were filed before the trial commenced, more specifically:

September 18, 1974	Motion for Continuance (R. 3030) Denied September 20, 1974 (R. 307)
September 27, 1974	Motion for Continuance and Severance (R. 353) Denied October 1, 1974 (R. 359)

The main theory adduced by the government was that Ehrlichman was guilty of conspiracy and obstruction of justice. The record reveals that Nixon's testimony was indispensable and that it could have led to a different conclusion. In a motion for leave to depose Nixon (Jt. App. 704) filed December 2, 1974, and verified by Ehrlichman (R. 528) it was stated that Nixon would testify that Ehrlichman always took the position (1) that full and complete disclosure with respect to the facts of the Watergate activities during the election of 1972 must be fully disclosed; (2) that Ehrlichman told Nixon that clemency was out of the question; (3) that in August of 1972 Ehrlichman proposed a full disclosure; (4) that the La Costa meeting was a strategy discussion and not part of a conspiracy to obstruct justice; (5) that Nixon instructed Ehrlichman to investigate the Watergate matter on a full disclosure basis and report to the President and that such report was not intended to be a whitewash; (6) that Ehrlichman never entertained a corrupt intent; and (7) that Ehrlichman's actions throughout the period of time were a good faith effort to protect the president in advising him to make a full disclosure of all of the relevant activities.

Few rights are more fundamental than that of an accused to present witnesses in his own defense. *Chambers v. Mississippi*, 410 U.S. 284, 302 93 S. Ct. 1038, 1049, 35 L.Ed. 2d 297 (1973), citing *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L.Ed. 2d 330 (1972); *Washington*

v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967); *In re Oliver,* 333 U.S. 257, 68 S. Ct. 499, 92 L.Ed. 682 (1948). The Sixth Amendment right to compulsory process – i.e., the right of an accused to offer the testimony of witnesses, and to compel their attendance if necessary – is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. As the Supreme Court declared in *Washington v. Texas, supra,* "[j]ust as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process." 388 U.S. at 19, 87 S. Ct., at 1923.[4]

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[4] The Supreme court, in Washington v. Texas, went on to observe that Joseph Story, in his famous Commentaries on the Constitution of the United States, stated that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common law rule that, in cases of treason or felony, the accused was not allowed to introduce witnesses in his defense at all. 3 Story, Commentaries on the Constitution of the United States Secs. 1786-1788 (1st ed. 1833). The Court went on to state that "[a]though the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787, Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury".

See generally Westen, *The Compulsory Process Clause,* 73 Mich. L. Rev. 71 (1974), and *Compulsory Process II,* 74 Mich. L.Rev. 191 (1975).

On September 4, 1974, well in advance of the trial, Ehrlichman subpoenaed Nixon, who was then in good health, in order to establish to the jury that he, Ehrlichman, was an unwilling victim of Watergate. (Jt. App. 503). When reports of Nixon's health made it appear that he would be physically unable to testify at the trial as then set, Ehrlichman moved the court on September 18, 1974 for a continuance and severance setting out areas in which he wished to interrogate and asking for a 60-90 day continuance (R. 303). On the same date, September 18, the government subpoenaed the former president. On September 19, the government in opposition to the above motion filed a response stating that there was no indication that Nixon would not be able to appear as a witness during the trial of this case and further stating that the government proposes to call him during its case and had issued a subpoena for this purpose. It further stated:

> "Thus the government has just as much interest in securing Mr. Nixon's testimony at trial as does defendant Ehrlichman." (R. 423)

On September 20, 1974, the trial judge denied Ehrlichman's motions stating no reasons (Jt. App. 425).

Thereafter on September 27, 1974, Ehrlichman moved the court for the entry of an order severing him from his co-defendants and continuing the trial date (Jt. App. 469). Ehrlichman stated as reasons therefor that he was the only defendant who had subpoenaed Nixon; that the trial could, therefore, go forward as to his co-defendants; and that, as Nixon's health improved, Ehrlichman could obtain his highly exculpatory testimony at trial or, in the alternative, could perpetuate his testimony by deposition, since it would be manifestly unfair and a viola-

tion of due process to commence the trial in this cause, thereby requiring Ehrlichman to make opening statements and to cross examine government witnesses, without first allowing him to perpetuate this vital and indispensable witness (R. 353/1-2). On October 1, 1974, the court denied the motion (R. 359).

On October 3, 1974, Nixon moved the court to quash the subpoena, alleging that his physical condition was such that compliance with the subpoena would have been detrimental to his health and would have posed a serious risk to his life (Jt. App. 495). The court stated:

> Now, in the meantime, I would like to make this suggestion: I think it would be helpful not only to the jury and all of the defendants and the Government if [Nixon] progresses to the Court where it would not injure his health, to make an appearance here to be examined in open court and these problems that are existing here.
>
> Mr. Ehrlichman has many questions, I suppose, he wants to ask him, but we can decide that later.
>
> * * *
>
> THE COURT: We are not going to need Nixon within the next few weeks. I can't see this case winding up from the Government's standpoint within the next four or five weeks unless they know more than I know about it. And you could get him here within a reasonable time. (R. 400/2964-2966).

On November 13, 1974, the trial court found "that the interest of defendant Ehrlichman and the proper administration of justice require that the Court appoint a panel of three eminent physicians" and therefore the court appointed a panel of three physicians to examine Mr. Nixon (R. 472-3). Certainly materiality and relevance had been determined by the trial judge before the appointment of the panel and examination of Nixon were undertaken.

On November 29, 1974, the report of the medical panel was received by the court and filed in the record of this case. It stated that it was their unanimous opinion that Mr. Nixon could not appear and testify before February 1975, and that he would not be well enough to give a deposition until at least January 6, 1975 (Jt. App. 701); 385 F. Supp. 1190 (D.D.C. 1974).

On or about December 1, 1974, Petitioner Ehrlichman moved the Court for leave to depose Mr. Nixon, commencing on January 6, 1975, at Mr. Nixon's residence in San Clemente, California (Jt. App. 704). On December 5, 1974, the Court denied this motion, thereby refusing to continue the trial until such depositions could be taken; moreover, the court refused to issue an order granting leave to take such depositions on January 6, 1975 (Jt. App. 749).

The trial judge's order denying the December 1 motion was a complete reversal of his position that it would be helpful to the jury to have Mr. Nixon make an appearance here to be examined in open court (R. 400/2964-2966). The court took the new position in recognition of the fact that continued adherence to said belief would have required a continuance or a mistrial, even though the Petitioner, before the trial, had raised the possibility that Mr. Nixon might not be able to testify.

The dissenting judge in the Opinion and Order of the United States Court of Appeals for the District of Columbia Circuit dated October 12, 1976, referred to the term "double standard". One was certainly applied here. This Court observed in *United States v. Nixon*, 418 U.S. 683, at 709:

> [t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all of the facts, within the framework of the rules of evidence. To insure that justice is done, it is imperative to the function of the courts that compulsory due process be available for the production of evidence needed either by the prosecution or the defense.

To insure that justice was done it was imperative for Ehrlichman to have Mr. Nixon's testimony to demonstrate that he was not guilty of a conspiracy to obstruct justice. The ends of criminal justice will be defeated if this judgment, which was founded on a partial presentation of the facts – i.e., the failure of Richard M. Nixon to testify – is permitted to stand. On the scales of justice, inconvenience and delay should not outweigh constitutional rights.

3. Petitioner Ehrlichman was deprived of his right under the Sixth Amendment to the effective assistance of his counsel in connection with pretrial discovery.

During the period before the commencement of the trial in the court below, Petitioner asserted his various rights to discovery pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963) and Rule 16, Federal Rules of Criminal Procedure. In addition, Petitioner asserted that he was entitled to certain materials under the Jencks Act, 18 U.S.C. § 3500. The trial court accepted, without more, the Government's assertion that it had provided Petitioner all the discovery materials required. Petitioner Ehrlichman resisted that assertion. Petitioner advised the court that certain material evidence was taken from him at the time of his resignation by the FBI, and that this material had been impounded and stored at the White House. Petitioner asserted that he was entitled to inspect these documents with his counsel present to assist him. The court denied that request requiring that Petitioner first inspect and analyze those documents and, thereafter, discuss Petitioner's conclusion as to relevance of the documents inspected, with his attorney. After such analysis, the court indicated that Petitioner would have to subpoena these documents subject to the clear stricture under Rule 17(c), F.R. Cr. P., that a subpoena is not a discovery device.

This Court should decide this question in order to provide appropriate standards to assure the effective assistance of counsel during discovery in a federal criminal prosecution. The Sixth Amendment provides that an accused shall have the assistance of counsel for his defense. The right to counsel is a vital ingredient in the scheme of due

process and requires strict protection by the courts. *McKinney v. United States*, 93 U.S.App.D.C. 222, 208 F.2d 844 (1953). Beginning with *Powell v. Alabama*, 287 U.S. 45, 93 S.Ct. 55, 77 L.Ed. 158 (1932), this Court has noted that during the most critical period of the proceedings, preparation for trial, defendants are as much entitled to the aid of their counsel as they are during the trial. This broad principle has been reaffirmed by this Court in *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1962). Whether or not this principle can be ameliorated through an ersatz approach to discovery is the issue.

The procedure adopted by the trial court required Petitioner to serve as his own counsel and deprived him of the effective assistance of counsel under the Sixth Amendment. In essence, Petitioner was required to inspect his White House papers without the benefit of counsel. Petitioner was then given the liberty to discuss the results of his inspection with his counsel. Thus, Petitioner and not his counsel was required to evaluate each document reviewed by him and to determine whether or not any particular document was relevant to the defense of the case. In *Alderman v. United States*, 394 U.S. 165 (1969), this Court noted that only defense counsel can appreciate the nuances involved with the strategy of the case. With this in mind, Petitioner's Sixth Amendment right was violated since he was effectively required to serve as his own counsel through the process of reviewing documents. To preclude counsel from participating in a decision as to what documents are significant to a defense limits counsel to merely the preparation of a subpoena for information provided to him by his client and denies Petitioner

the right to effective assistance of counsel. More is required and this Petition for Writ of Certiorari should, therefore, be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1381
United States of America

v.

Harry R. Haldeman, Appellant

No. 75-1382
United States of America

v.

John D. Ehrlichman, Appellant

No. 75-1384
United States of America

v.

John N. Mitchell, Appellant

September Term, 19 76
Criminal 74-110

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: BAZELON, Chief Judge, and WRIGHT, McGOWAN, LEVENTHAL, ROBINSON, and MacKINNON, Circuit Judges, sitting en banc

J U D G M E N T

These causes came on to be heard by the Court sitting en banc and were argued by counsel. On consideration of the foregoing it is

ORDERED AND ADJUDGED by this Court sitting en banc that the judgments of the District Court appealed from in these causes are hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
George A. Fisher, Clerk

By: Robert A. Bonner,
Chief Deputy Clerk

Date: October 12, 1976
Opinion Per Curiam.
Opinion filed by Circuit Judge MacKinnon, dissenting in part and concurring in part.